

THIS DISPOSITION IS
NOT CITABLE AS
PRECEDENT OF THE TTAB

Mailed:
May 9, 2005
AD

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

A.J. Boggs & Co.
v.
Intrado Inc.

Cancellation No. 92040559

Jeffrey A. Sadowski of Howard & Howard Attorneys, P.C. for
A.J. Boggs & Co.

Gordon E.R. Troy, Esq. for Intrado, Inc.

Before Seeherman, Hairston, and Drost, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On March 19, 2002, Registration No. 2,551,269 issued on
the Supplemental Register for the mark "911.NET" in typed
form to respondent (Intrado Corp.)¹ for the following
services:

Communication services, namely telephone, wireless, and
global computer network communications for identifying
and notifying a designated population of an impending
emergency situation; Communication services, namely

¹ The case caption now correctly reflects the name of respondent.
See Order dated August 29, 2003 at 4 ("The Office incorrectly
recorded a security agreement as an assignment and changed
respondent's name in the caption of this proceeding").

electronic communication and information systems that facilitate access to and use of emergency information by emergency administration personnel, public service access providers, public safety agencies, and commercial firms providing emergency services; telecommunications gateway services, namely computerized 911 support, coordination, call generation and voice messaging in Class 38.

The registration was based on an intent-to-use application that was filed on January 19, 2000. The application was amended on November 7, 2001, to seek registration on the Supplemental Register. The registration asserts a date of first use and first use in commerce of October 15, 2001.

On April 19, 2002, petitioner (A.J. Boggs & Co.) petitioned to cancel respondent's registration on the ground that it owns the domain name "911.net" and it applied to register the mark 911.NET for the following services:

Internet-based information security services, namely, secured transaction, authentication, registration, identification, virtual private network, encryption, data transport and storage, and verification services; facilities, computer equipment, and network security monitoring services; security applications, infrastructure, and operations support services; and monitoring services for compliance with household and enterprise policies, events, procedures, and applicable regulatory standards in Class 42.

During the course of the examination of the application, petitioner alleges that it was advised that respondent's then pending application for 911.NET might be cited against petitioner. Petitioner goes on to allege that by "reason that Petitioner's mark was first used prior to

Registrant's filing of their application, Petitioner has rights in its mark superior to Registrant's rights."

Petition to Cancel at 2. Petitioner alleges that it "first used the mark on May 16, 1996 and first used the mark in commerce on October 23, 2000." Id. Petitioner concludes by claiming that respondent's registration "will continue to interfere with Petitioner's full enjoyment of its rights in its 911.NET and will result in substantial detriment to Petitioner." Id. at 3. Respondent denies the salient allegations of the petition to cancel.

The Record

The record consists of the following items: the file of the involved registration; the trial testimony deposition of Russell Lahti, petitioner's network administrator, with accompanying exhibits; the trial testimony deposition of John Clarke Anderson, petitioner's founder and manager, with accompanying exhibits; the trial testimony deposition of petitioner's president, James D. Anderson, with an exhibit, and the trial testimony deposition of petitioner's customer, Albert H. Eaton, with accompanying exhibits;² and respondent's notice of reliance on a copy of its Registration No. 2,204,802 and a certified copy of U.S. Application Serial No. 78078405.

² The depositions have been labeled as confidential, which will limit our reference to them.

Standing

The initial question that we address is whether petitioner has standing. Young v. AGB Corp., 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998) ("Section 14 has been interpreted as requiring a cancellation petitioner to show (1) that it possesses standing to challenge the continued presence on the register of the subject registration and (2) that there is a valid ground why the registrant is not entitled under law to maintain the registration") (internal quotation marks omitted).

For standing, petitioner asserts that respondent's application (now registration) has been cited as a potential bar to its application. Petition to Cancel at 2. The file of petitioner's application (No. 78078405) shows that proceedings are suspended pending the disposition of another application. The examining attorney indicated with regard to, inter alia, Serial No. 75898002, which ultimately registered to respondent as No. 2,551,269, that if "one or more of the referenced applications matures into a registration, the examining attorney may refuse registration." See Serial No. 78078405, Office Action dated January 16, 2002 at 3. This evidence establishes petitioner's standing. Lipton Industries, Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) (parenthetical omitted) ("To establish a reasonable basis

for a belief that one is damaged by the registration sought to be cancelled, a petition may assert a likelihood of confusion which is not wholly without merit or, as here, a rejection of an application during prosecution"). See also Beech Aircraft Corp. v. Lightning Aircraft Co., 1 USPQ2d 1290, 1293 (TTAB 1986) ("Petitioner has pleaded rejection of its own application for registration of the mark LIGHTNING on the basis of registrant's outstanding registration and, on this ground, would clearly not be a mere 'intermeddler'"); Rail-Trak Construction Co. v. Railtrack, Inc., 218 USPQ 567, 571 (TTAB 1983) ("Pleading and proof of rejection of an application based on the registration sought to be cancelled is enough to create standing in a cancellation proceeding"). A certified copy of petitioner's application Serial No. 78078405 has been made of record. See Respondent's Notice of Reliance dated June 22, 2004. Therefore, petitioner has pleaded and proven its standing.

Priority

The next question we must determine is whether petitioner has shown that it has priority of use of the term "911.NET" for the services. We begin by responding to registrant's argument that "petitioner has not satisfied the 'use in commerce' requirements of 15 U.S.C. § 1127 to establish priority of right in 911.NET." Brief at 9. It is not required that petitioner establish that it used its mark

in commerce or even that it used its mark in a technical trademark manner in order to prevail in this proceeding.

It is not required that Editors meet the technical statutory requirements to register ACE as its mark for award ceremonies in order for Editors to have a basis for objection to another's registration. Prior public identification of petitioner with the name ACE for awards from use analogous to service mark usage is a sufficient ground for cancellation. See Jim Dandy Co. v. Martha White Foods, Inc., 458 F.2d 1397, 173 USPQ 673 (CCPA 1972) (use of a term as advertising slogan sufficient to defeat a right of registration of mark by another); see also [American Stock Exch., Inc. v. American Express Co.], 207 USPQ 356, 363 (TTAB 1980)] (opposition may be based on use of term in manner analogous to trademark use, such as "in advertising, use as a grade mark, use as the salient or distinguishing feature of a trade name, use of an acronym or the initial letters of a corporate name, etc").

National Cable Television Association v. American Cinema Editors Inc., 937 F.2d 1572, 19 USPQ2d 1424, 1429 (Fed. Cir. 1991) (footnote 4 set out below).

For instance, one criterion for registrability is "use in commerce" as defined in 15 U.S.C. § 1127. See Larry Harmon Pictures Corp. v. Williams Restaurant Corp., 929 F.2d 662, 18 USPQ2d 1292 (Fed. Cir. 1991); In re Mother Tucker's Food Experience (Canada) Inc., 925 F.2d 1402, 17 USPQ2d 1795 (Fed. Cir. 1991). Were failure to show "use in commerce" a bar to petitioning for cancellation of a registration, a party could never cancel a mark based solely on intrastate use. This is not the law. Section 14 requires only prior use; "in commerce" is noticeably absent. See, e.g., Hess's of Allentown, Inc. v. National Bellas Hess, Inc., 16 USPQ 673, 677 (TTAB 1971) (Prior use of mark in intrastate commerce sufficient to sustain petition for cancellation based on likelihood of confusion with that mark); Plymouth Cordage Co. v. Solar Nitrogen Chem., Inc., 152 USPQ 202, 204 (TTAB 1966) (same).

Id. at 1429 n.4.

The petition to cancel, which relied upon petitioner's allegations of ownership of a domain name and a date of first use anywhere that preceded its allegation of a date of first use in commerce by more than four years, indicated that petitioner was not simply relying on its perfected trademark rights, but also on use analogous to trademark use.

Another issue in determining priority is that, inasmuch as petitioner is not relying on a federal registration as a basis of its allegations of a likelihood of confusion, we must consider whether petitioner's mark is distinctive, either inherently or through acquired distinctiveness.

Under the rule of Otto Roth, a party opposing registration of a trademark due to a likelihood of confusion with his own unregistered term cannot prevail unless he shows that his term is distinctive of his goods, whether inherently or through the acquisition of secondary meaning or through "whatever other type of use may have developed a trade identity." Otto Roth & Co. v. Universal Foods Corp., 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981). The Otto Roth rule is applicable to trademark registration cancellation proceedings as well.

Towers v. Advent Software Inc., 913 F.2d 942, 16 USPQ2d 1039, 1041 (Fed. Cir. 1990) (full citation added).

We note that the registration that petitioner seeks to cancel is registered on the Supplemental Register, which is an admission that the term is not inherently distinctive. In re Consolidated Foods Corp., 200 USPQ 477, 478 n.2 (TTAB 1978) ("Registration of the same mark on the Supplemental

Register is not prima facie evidence of distinctiveness; in fact, such a registration is an admission of descriptiveness"). See also Quaker State Oil Refining Corp. v. Quaker Oil Corp., 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972).

Petitioner argues (Brief at 7) that:

Petitioner provides no emergency services to people but rather it provides services to businesses allowing for private and secure transmission and sharing of data through computer networks. "911," as used by Petitioner, connotes a sense of security that upon thought and reflection, allows consumers to conceptualize the nature of Petitioner's services. Thus, Petitioner's 911.NET mark is suggestive and inherently distinctive of the services provided... Registrant specifically identifies emergency telecommunication services. Therefore, the use of this mark in conjunction with emergency 911 services would not only be descriptive of the use, but also generic.

When we view petitioner's services as described in its application and to which petitioner refers in its petition to cancel and as shown by the record as the services in connection with which petitioner has used its mark, the term 911.NET is not descriptive of these services.³ Instead, it suggests calling for help or receiving assistance for petitioner's information and network security services.

³ As will be discussed subsequently, to the extent that petitioner is relying on services that overlap respondent's services, it has not shown that it has acquired distinctiveness for the term as used in connection with those services. If neither party's mark is inherently distinctive, the board has held that "priority lies with the party whose mark is the first to become distinctive through use in commerce. Perma Ceram Enterprises Inc. v. Preco Industries Ltd., 23 USPQ2d 1134 (TTAB 1992)." Larami Corp. v. Talk To Me Programs Inc., 36 USPQ2d 1840, 1845 n.8 (TTAB 1995).

Therefore, we now look at the evidence showing the earliest date on which petitioner can claim use for the purposes of establishing priority (Hereinafter priority date). In particular, we consider the evidence relating to when petitioner first used 911.NET as a service mark for the services identified in the application. The first piece of evidence is a piece of correspondence on letterhead stationery with the "911.Net" logo. Lahti dep. Ex. 2. The letter also encloses a project satisfaction survey, which includes the "911.NET" logo. The letter is dated May 23, 2001, and it discusses Internet security monitoring. Another exhibit, James Clarke Anderson dep. Ex. 12, is an invoice with the letterhead "911.net Secure Networking Services." It is dated October 23, 2000. Petitioner's witness testified that "when we invoiced, it was the first time that that trademark was used." James C. Anderson dep. at 54. The witness clarified that "it was during the first half of October that we provided the service, but we didn't have a trademark, you know, there was no paperwork or, you know, any kind of collateral product stuff left behind." Id. Petitioner has also submitted a flyer dated February 2001 that lists petitioner's services as "911.net Network Security Consulting." James Clarke Anderson dep. Ex. 13.

Respondent argues that it "has long been held that use of a mark on an invoice which was inserted in a package with goods was not a 'use' in commerce." Brief at 8. However, petitioner has alleged that it is providing services, and invoices are good specimens to demonstrate service mark usage.

Unlike in a trademark application, where specimens filed must reflect use of the mark on the goods or their containers or displays associated with the goods or tags or labels affixed to the goods, a service mark application must reflect use of the mark "in the sale or advertising of services" which is much broader in scope than that of a trademark and may include advertisements, brochures, invoices, and virtually every form of printed matter.

In re Piece Goods Shops, Inc., 178 USPQ 512, 512 (TTAB 1973). See also Industrial Valley Bank and Trust Co. v. Bankers Trust of South Carolina, N.A., 201 USPQ 888, 893 (TTAB 1979).

Petitioner's invoice demonstrates that it used 911.NET as a service mark at least by October 23, 2000.

We turn next to the evidence relating to whether petitioner used 911.NET in a manner analogous to trademark use prior to October 23, 2000. We find that such evidence for petitioner fails to establish a priority date earlier than October 23, 2000. While use that is not technical trademark or service usage may constitute evidence of priority, an "unbroken line of precedents of both this court and the Board make clear that activities claimed to

constitute analogous use must have substantial impact on the purchasing public." T.A.B. Systems v. PacTel Teletrac, 77 F.3d 1372, 37 USPQ2d 1879, 1882 (Fed. Cir. 1996). "For example, if the potential market for a given service were 10,000 persons, then advertising shown to have reached only 20 to 30 people as a matter of law could not suffice." Id. at 1883.

Here, it is apparent that petitioner's evidence for an earlier priority date reached very few people and even fewer potential purchasers. One example of petitioner's evidence is a business plan that mentions 911.NET on page 36 of the plan. James Clarke Anderson dep. Ex. 6.⁴ On page 2, the plan is marked as confidential and there is no evidence that any significant number of potential purchasers saw the document. Much of the other evidence simply points to a brand or service that respondent was developing as opposed to demonstrating actual use of the term.

The remaining evidence would not be likely to have an impact on purchasers. One exhibit is a grant application that respondent's witness reported "lists 911.net as a brand." John Clarke Anderson test. dep. at 20. Another

⁴ Furthermore, this document does not evidence any public use. The witness testified that the plan was not distributed outside the company except once when an employee took the "business plan to a banker without authorization to disclose it, and after we discovered she did that, she was fired." James Clarke Anderson test. dep. at 25.

document (Ex. 7) is described as "an agenda for a meeting that was internal to our company, and we were presenting product plans." James Clarke Anderson test. dep. at 24. Another document is an email to a potential customer that asks the potential customer the following question: "Would it work to develop the 911.net brand for 'personal network security'?" James Clarke Anderson Ex. 8. Petitioner also introduced Ex. 9, which is dated March 20, 2000, that is a "Business Concept Document" that does show "911.net" and that discusses applicant's services. However, it is marked "confidential" and the witness described the document as "another internal concept document developed in the spring of 2000." James Clarke Anderson test. dep. at 45. It, therefore, would not have had a substantial impact on the purchasing public.

Similarly, the acquisition of a domain name does not by itself establish priority of use of the term for petitioner. Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 50 USPQ2d 1545, 1556 (9th Cir. 1999):

Although widespread publicity of a company's mark ... may be sufficient to create an association among the public between the mark and West Coast, mere use in limited e-mail correspondence with lawyers and a few customers is not. West Coast first announced its web site at "moviebuff.com" in a public and widespread manner in a press release of November 11, 1998, and thus it is not until at least that date that it first used the "moviebuff.com" mark for purposes of the Lanham Act... West Coast's first use date was *neither* February 1996 when it registered its domain name with Network Solutions as the district court had concluded,

nor April 1996 when it first used "moviebuff.com" in e-mail communications, but *rather* November 1998 when it first made a widespread and public announcement about the imminent launch of its web site.

In this case, applicant's simple acquisition of a domain name and other limited activities do not demonstrate that these activities had a widespread impact on the public.

We next look at respondent's evidence of use to demonstrate whether it can establish priority. In addition to its application, respondent has only submitted a copy of petitioner's application and another registration of respondent. Normally, an application filing date for a use-based application can establish first use of a mark. Levi Strauss & Co. v. R. Josephs Sportswear Inc., 36 USPQ2d 1328, 1332 (TTAB 1994) ("Implicit in all these cases in which the applicant submitted no evidence whatsoever, or submitted no evidence as to its use of the mark, is that an applicant does not have an affirmative duty to submit evidence of its use of the mark"). Even for an intent-to-use application, this date can serve as a constructive date of first use. 15 U.S.C. § 1057(c). See also Zirco Corp. v. American Telephone and Telegraph Co., 21 USPQ2d 1542, 1544 (TTAB 1991) ("[T]here can be no doubt but that the right to rely upon the constructive use date comes into existence with the filing of the intent-to-use application and that an intent-to-use applicant can rely upon this date in an opposition brought by a third party asserting common law rights").

However, in this case, respondent's mark is registered on the Supplemental Register. When respondent filed its application seeking registration on the Principal Register (January 19, 2000), the application could not be filed on the Supplemental Register because the mark was not in use in commerce.⁵ See 15 U.S.C. § 1091(a) ("All marks capable of distinguishing applicant's goods ... which are in lawful use in commerce ... may be registered on the supplemental register"). Inasmuch as respondent's application that issued as Registration No. 2,551,269 on the Supplemental Register was initially filed as an intent-to-use application, the amendment to seek registration on the Supplemental Register becomes respondent's effective filing date. TMEP § 1102.03 (3rd ed. 2003) ("If an application is based solely on §1(b), and the applicant files an acceptable amendment to allege use or statement of use and an acceptable amendment to the Supplemental Register, the Office will consider the filing date of the amendment to allege use or statement of use to be the effective filing date of the application. 37 CFR § 2.75(b)"). See also In re Software Publishers Association, 69 USPQ2d 2009, 2010 n.2 (TTAB 2003) ("Because of applicant's amendment to the

⁵ Respondent amended the application on November 7, 2001, to allege that it first used the mark in commerce on October 15, 2001, and at that time amended it to seek registration on the Supplemental Register.

Supplemental Register, the effective filing date of this application becomes the date applicant amended to the Supplemental Register after filing an acceptable amendment to allege use"). Therefore, respondent's effective filing date is November 7, 2001, which is subsequent to petitioner's October 23, 2000, priority date.⁶

The only other evidence that respondent has submitted that might be relevant to establishing its priority date is a certified copy of a Principal Register registration (No.

⁶ A registration on the Supplemental Register does not have the same presumptions that are accorded a registration on the Principal Register. Nautalloy Products, Inc. v. Danielson Manufacturing Co., 130 USPQ 364, 365 (TTAB 1961) ("Since a registration on the Supplemental Register is not afforded any presumptions by the statute, petitioner's registration of 'CHROMALLOY' is incompetent to establish petitioner's claim of prior rights therein"); Andrea Radio Corp. v. Premium Import Co., 191 USPQ 232, 234 n.7 (TTAB 1976) ("Registrations on the Supplemental Register do not receive the advantages of Sec. 7(b) of the Trademark Act: See: Sec. 26. Therefore, Registration No. 330,579 is not evidence of anything save that the certificate was issued on the date printed thereon"); Copperweld Corp. v. Arcair Corp., 200 USPQ 470, 474 (TTAB 1978) (A Supplemental Registration "does not constitute prima facie evidence of registrant's ownership of the mark, or its exclusive right to use the mark in commerce. In fact, it is not prima facie evidence of anything except that the registration issued"); In re Federated Department Stores Inc., 3 USPQ2d 1541, 1543 (TTAB 1987) ("It is overwhelmingly agreed that a Supplemental Register registration is evidence of nothing more than the fact that the registration issued on the date printed thereon... It is entitled to no presumptions of validity, ownership, use or priority"); Hi-Shear Corporation v. National Automotive Parts Association, 152 USPQ 341, 344 (TTAB 1966) ("[A] Supplemental Registration is not accorded the prima facie presumptions afforded by Section 7(b) of the Statute with regard, inter alia, to the validity of the registration and registrant's exclusive right to use the mark in commerce; and manifestly therefore cannot be considered as evidence of a proprietary right in the registered mark").

2,204,802) for the mark "9-1-1 NET" for "communication services, namely, electronic communication systems that facilitate access to and use of emergency information by emergency administration personnel and public service access providers." The registration includes a disclaimer of the term "9-1-1," apart from the mark as shown. These services are virtually identical (changes noted with brackets) to some of the services in the Supplemental Register registration at issue in this proceeding, i.e., "Communication services, namely electronic communication [and information] systems that facilitate access to and use of emergency information by emergency administration personnel, [and] public service access providers." However, respondent's Supplemental Registration includes other services that are not found in the earlier registration. It "is well settled that an applicant's ownership of a mark differing from that sought to be registered can add nothing to its rights of registration." William Grant & Sons Limited v. Old Grantian Co., 160 USPQ 20, 22 (TTAB 1968). In this case, respondent cannot establish its priority date by simply relying on a prior registration for much narrower services and a slightly different mark.

Therefore, based on the evidence of record, we conclude that petitioner has priority by virtue of its use of 911.NET as a service mark at least as early as October 23, 2000.

Likelihood of Confusion

Next, we must determine whether there is a likelihood of confusion, because if a petitioner with priority does not show that confusion is likely, the petitioner cannot prevail.⁷ In likelihood of confusion cases, we consider the evidence of record in light of the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

We first consider petitioner's and respondent's services. Respondent's services are:

Communication services, namely telephone, wireless, and global communications for identifying and notifying a designated population of an impending emergency situation; Communication services, namely electronic communication and information systems that facilitate access to and use of emergency information by emergency administration personnel, public service access providers, public safety agencies, and commercial firms providing emergency services; telecommunications gateway services, namely computerized 911 support, coordination, call generation and voice messaging.

Petitioner's services are Internet-based information security services. These services are clearly significantly different from respondent's services. Respondent's services are directed to emergency personal and the "911" emergency

⁷ Respondent did not address the likelihood of confusion issue in its brief.

telecommunications services. Petitioner's services do not indicate that there would be any significant overlap between the respective services. Petitioner argues that "[c]ustomers seeking communications services associated with information systems that facilitate access to and use of emergency information from Registrant will certainly have a need for the information security services provided by Petitioner to authenticate, protect and monitor their networks." Brief at 10-11. Petitioner has the burden of establishing the elements of its case inasmuch as it is petitioning to cancel respondent's registration. There is little evidence to support petitioner's conclusion that the telecommunication services of respondent and petitioner's Internet services would be encountered by the same purchasers. In any event, the mere fact that the same entity may purchase petitioner's and respondent's services does not by itself establish that the services are related. Electronic Data & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992) ([A]lthough the two parties conduct business not only in the same fields but also with some of the same companies, the mere purchase of the goods and services of both parties by the same institution does not, by itself, establish similarity of trade channels or overlap of customers").

We next turn to the similarities and dissimilarities of petitioner's and respondent's marks. Respondent's and petitioner's marks are both for the term "911.NET." They are identical in sound and appearance.

However, as noted earlier, the services of petitioner and respondent are different. When the marks of the parties are used on these different services, their meanings and commercial impressions would not be identical. For petitioner's Internet-based information security services, the mark suggests that its services assist with emergencies and problems. Therefore, the mark is suggestive when used in association with these services.⁸

On the other hand, the registration that petitioner seeks to cancel is registered on the Supplemental Register, which is an admission that the term is not inherently distinctive. In re Consolidated Foods Corp., 200 USPQ 477, 478 n.2 (TTAB 1978) ("Registration of the same mark on the Supplemental register is not prima facie evidence of distinctiveness; in fact, such a registration is an admission of descriptiveness"). See also Quaker State Oil Refining Corp. v. Quaker Oil Corp., 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972). Inasmuch as the mark 911.NET is for services that include "computerized 911 support,

⁸ If petitioner's services concerned emergency information network services, the mark would be highly descriptive.

coordination, call generation and voice messaging," the "911" element of its mark would not be of much significance in distinguishing marks involving 911 support. Secondly, the "NET" feature of respondent's mark involving global computer network communications for identifying and notifying a designated population of an impending emergency and computerized 911 support would again not be of source-identifying significance. The term ".NET" is a top level domain commonly used with Internet addresses. Panvision Int'l L.P. v. Toeppen, 141 F.3d 1316, 46 USPQ2d 1511, 1513 (9th Cir. 1998) ("The Internet is divided into several 'top level' domains: .edu for education; .org for organizations; .gov for government entities; .net for networks; and .com for "commercial" which functions as the catchall domain for Internet users"). Therefore, respondent's term 911.NET for its "911" services for communication services involving a global computer network is highly descriptive inasmuch as it describes its use with a 911 network.

Therefore, the marks' meanings and commercial impressions as used in association with the parties' services are not identical. In addition, the descriptiveness and/or suggestiveness of the marks is a factor that indicates that confusion is not likely. In re Texas Instruments Inc., 193 USPQ 678, 679 (TTAB 1976) ("[W]hile the registered mark 'COPPERCLAD' must be deemed to

be capable of distinguishing registrant's goods in commerce, it nevertheless is merely descriptive of such goods and as such, is entitled to a narrow scope of protection"); In re Central Soya Co., 220 USPQ 914, 917 (TTAB 1984) ("The Board, too, has given limited protection to descriptive marks registered on the Supplemental Register"). The CCPA, a predecessor of our primary reviewing court, has also recognized that descriptive marks on the Supplemental Register may only be entitled to a narrow scope of protection. In re The Clorox Co., 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978) ("The level of descriptiveness of a cited mark may influence the conclusion that confusion is likely or unlikely").

Because of the descriptive and suggestive nature of the marks and the differences in these services, we hold that confusion is not likely.

However, there is one additional point to discuss on the issue of likelihood of confusion and that concerns the specific evidence of the services with which petitioner intends to use its marks. These services are more specific than the services in the application and petitioner's evidence indicates that it intends to use the mark in association with emergency network services.

911.net Services ...

- Roadside Services
- Towing Services

- Battery Jump Start
- Emergency Call Handling
- Security Systems for Residential and Commercial Use
- Crime and Accident Reporting
 - Emergency Event Tracking
 - Criminal and Accident Event Directories

Strategy

- Team with ... to use the 911.net brand for an emergency response network tied in with an on-board phone services...
- Team with Lifedata for secure data management, including web access to 911.net status for security information about a car, home, or personal information...

As an application service provider (ASP), 911.net will deliver state-of-the-art records management, secure messaging, practice management, and clinical information systems to physicians, and small-to-medium size health care organization.

John Clarke Anderson test dep. Ex. 9, pp. 4-5.

Later, petitioner's exhibit indicates that 911.net services "could be for services to emergency rooms, ambulance services, public safety agencies." Id. at 14. Furthermore, petitioner lists "emergency response knowledge networks" among the directory and eBusiness services it is developing for its 911.net brand. John Clarke Anderson test dep. Ex. 12 at 1905.

Petitioner's evidence shows that its services are intended to be used with an emergency response network. At this point, we take judicial notice⁹ of the fact that

⁹ University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

"network" is defined as "a system of computers interconnected by telephone wires or other means in order to share information. Also called net." *The American Heritage Dictionary of the English Language* (4th ed. 2000).

Petitioner admits (Brief at 7) that the "three-digit abbreviated dialing code '911' is commonly associated with an emergency situation where people dial that number in a life or death situation to receive assistance." While petitioner argues (id.) that it "provides no emergency services," its literature indicates that its services may be used to facilitate 911 emergency services. However, petitioner does not argue that there would be confusion on this basis. To the extent that petitioner's mark would be used in association with providing a network database for 911 emergency services, the term would likely be highly descriptive of these services, and petitioner has not shown that it has acquired distinctiveness or priority for its mark in relation to those services. Confusion under these future circumstances would be speculative and unlikely.

Even in this possible area of overlap, the purchasers of the parties' services would likely be sophisticated purchasers, which would undercut the possibility of confusion. In re Shipp, 4 USPQ2d 1174, 1176 (TTAB 1987) ("The goods and services would not likely be encountered by applicant's customers and to the extent that they are

encountered by customers in the dry cleaning industry, this narrow group is believed to be sufficiently sophisticated such that confusion is unlikely").

We conclude that "the potential for confusion appears a mere possibility not a probability." Electronic Data & Sales, 21 USPQ2d at 1393.

Decision: The petition to cancel Registration No. 2,551,269 is denied.